

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 27, 2006

CHRISTOPHER KNIGHTON v. STATE OF TENNESSEE

Appeal from the Circuit Court for Blount County
No. C-13771 D. Kelly Thomas, Jr., Judge

No. E2005-02534-CCA-R3-PC - Filed July 5, 2006

The petitioner, Christopher Knighton, appeals as of right from the order of the Blount County Circuit Court denying his petition for post-conviction relief from his 1999 convictions of aggravated rape, a Class A felony, aggravated burglary, a Class C felony, and theft, a Class D felony, for which he is serving an effective thirty-one-year sentence. The petitioner claims he received the ineffective assistance of counsel at trial and on direct appeal because (1) counsel did not adequately advise him of the applicable law before he rejected a plea offer, (2) counsel failed to object to the state's exercise of peremptory challenges to strike men from the jury venire, (3) counsel employed an ill-advised defense at trial, and (4) counsel failed to raise a sentencing challenge on direct appeal. We conclude no error exists, and we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

J. Liddell Kirk, Knoxville, Tennessee, for the appellant, Christopher Knighton.

Paul G. Summers, Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Rocky H. Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The evidence at the trial reflected that the petitioner and Andre Jackson went to the home of the victim because the petitioner was aggrieved that the victim's boyfriend, Stacy Sudderth, had cheated them in a drug transaction. The petitioner and Jackson planned to take things to compensate them for the \$3,000 they had paid Sudderth. During the course of the burglary and theft, the victim came home, and the men, both of whom were armed and masked, forced her into a bedroom. The petitioner bound her hands with a telephone cord, and Jackson cut off her clothing. The petitioner

left the room, and Jackson raped the victim. Jackson himself was the victim of a homicide the next day. The petitioner was convicted of aggravated robbery, aggravated rape, and theft. The petitioner received a twenty-five year sentence for aggravated rape, a six-year sentence for aggravated burglary, and a four-year sentence for theft, with the aggravated burglary and theft sentences to be served concurrently with each other but consecutively to the aggravated rape sentence, for an effective sentence of thirty-one years.

On direct appeal, this court reviewed issues related to sufficiency of the evidence, the jury selection process, sufficiency of the evidence, sufficiency of the indictment, and admission of the petitioner's prior drug convictions for impeachment purposes. Relative to sufficiency, although no evidence showed the petitioner sexually penetrated the victim, this court held the proof sufficient because he aided Jackson in raping the victim. State v. Christopher Knighton, No. E2000-00746-CCA-R3-CD, Blount County, slip op. at 2-4 (Tenn. Crim. App. Feb. 15, 2001).

The petitioner filed a timely petition for post-conviction relief. He alleged various instances of ineffective assistance of counsel. He later, through counsel, amended his petition to include additional allegations of ineffective assistance.

At the evidentiary hearing, the petitioner testified that he was eighteen years old when the offenses occurred and nineteen years old by the time of his trial. He said he had very little communication with his counsel before the trial, counsel having met with him on only one occasion, two days before the trial, for approximately thirty minutes. He testified he called counsel's office fifteen to twenty times but was only able to speak with his counsel's secretary. The petitioner said his grandfather went to his counsel's office, but he did not think his grandfather had ever been able to talk to his counsel. He also testified that he did not talk to his counsel during the appeal process and that they never discussed whether sentencing issues would be raised on appeal.

The petitioner testified that his attorney told him he was facing a rape charge for which he might be convicted but that his attorney did not explain to him that he could be convicted based on evidence that Jackson, not he, physically penetrated the victim. The petitioner said he rejected a plea offer from the state for a ten-year sentence to the aggravated rape charge but claimed if he had understood that he could be found criminally responsible for the crime, he would have accepted the offer.

The petitioner testified that he was tried before an all-female jury. He said the state exercised peremptory challenges excusing all the men from the panel. The petitioner testified that trial counsel told him that the state's strategy of seeking an all-female jury in a rape case would probably backfire and that counsel wrote the issue on a legal pad and said that this was a basis for appeal.

Relative to trial counsel's selection of defense strategy, the petitioner claimed that he and his attorney never discussed the relative strength of the state's case regarding identification of him as one of the perpetrators. He said his attorney also never advised him of the relative strength of the state's case regarding his culpability for the crimes that occurred.

The attorney who represented the petitioner at the trial and on direct appeal testified that he met with the petitioner at the jail several times to discuss the petitioner's case. Counsel told the petitioner he could be convicted of aggravated rape even though he did not commit the physical act of rape, although counsel was unsure whether they specifically discussed the theories of criminal responsibility and facilitation in legal terms. Counsel said that he conveyed the plea offer to the petitioner but that before they were able to discuss the offer fully and reach a decision, the state withdrew the offer because it had made a mistake in extending it.

The attorney testified he did not object to the state's use of peremptory challenges to exclude men from the jury because he felt that a panel of women might not be fond of the victim because of her lifestyle. He did raise the jury composition issue on direct appeal.

Relative to trial strategy, the attorney testified that he was somewhat limited by the petitioner's insistence that he had not been present at the crime scene and had no involvement in the crimes. The attorney said he was disinclined to pursue an inconsistent defense strategy which advanced that the petitioner was not present, but even if he were present, his culpability was limited. The attorney said he was concerned with presenting a defense which conceded the petitioner's presence but focused on minimizing his culpability because if the petitioner were to testify, the minimal culpability defense would be at odds with the petitioner's testimony that he was not involved at all.

The attorney said he did not recall his thought process in deciding whether to raise an issue in the direct appeal relative to consecutive sentencing. He did not recall whether he had raised the issue, and he conceded he probably had not because it was not addressed in the appellate opinion.

The petitioner offered the testimony of Maurice Asbury in support of his post-conviction claim. Asbury had testified at trial for the state that the petitioner had come to his home in the early morning of the day the crimes took place. According to Asbury's trial testimony, the petitioner had said that "he was going to f— some girl." At the post-conviction hearing, Asbury testified he had given a statement to the police before the petitioner's trial, but he could not recall whether he had spoken with defense counsel. He testified that the petitioner's attorney had never asked him on cross-examination if the petitioner had said anything about this statement being in reference to the victim, as opposed to someone with whom the petitioner planned to have consensual relations. Asbury said he took the petitioner's statement to mean the latter and would have said so had he been asked.

The trial court entered a written order detailing its findings of fact and conclusions of law. It accredited counsel's testimony that the state withdrew the plea offer before the petitioner could accept or reject it, and, thus, it was not necessary to determine whether the petitioner ultimately would have accepted the agreement. The court dismissed the petitioner's complaint relative to the all-female jury, finding that the petitioner and his attorney had discussed the issue and that counsel thought that the all-female jury might actually benefit the defense. The trial court found that counsel had been deficient in failing to raise a consecutive sentencing issue on direct appeal. The court

found, however, that in view of petitioner's prior record, the petitioner had not carried his burden of proving that the appellate court would have granted relief. It also found that the petitioner had not carried his burden regarding mitigating proof that should have been presented at the sentencing hearing. The court found that although a minimal culpability defense would have been more plausible than the identity defense offered, trial counsel was not able to present a defense that was contrary to what the petitioner represented the facts to be. The court accredited counsel's testimony that the petitioner told counsel he was not present at the crime scene, and the court noted that the presentence report that was an exhibit at the post-conviction hearing reflected that the petitioner told the officer who prepared the report, "I was not involved at all." After disposing of all the petitioner's factual contentions, the trial court held that the petitioner had failed to carry his burden of proof and denied relief.

The burden was on the petitioner in the lower court to prove by clear and convincing evidence the factual allegations that would entitle him to relief. T.C.A. § 40-30-110(f) (2003). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. See Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). In this respect, the petitioner, as the appellant, has the burden of illustrating how the evidence preponderates against the judgment entered. Id. However, we review the trial court's conclusion regarding the effectiveness of counsel de novo because it involves a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999).

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, 104 S. Ct. at 2066. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694, 104 S. Ct. at 2068. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 104 S. Ct. at 2069.

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065. Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See DeCoster, 487 F.2d at 1201.

I.

The petitioner's first appellate claim of ineffective assistance of counsel is that his attorney did not adequately advise him of the applicable law of criminal responsibility before he rejected a plea offer. As his attorney testified and the trial court found, the state withdrew the plea offer before the petitioner had time to act on it. The evidence does not preponderate against this finding. See Black, 794 S.W.2d at 755. Given this finding that there was no plea agreement for the petitioner to accept, he cannot demonstrate prejudice from any alleged deficiencies of counsel in advising him with regard to the plea agreement. See Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

II.

Second, the petitioner argues that his attorney was ineffective because he failed to object to the state's exercise of peremptory challenges to strike men from the jury venire. The lower court accredited the testimony of the petitioner's attorney about his tactical decision not to object to the state's apparent strategy of excluding men from the jury because counsel believed the state's strategy might backfire. The evidence before us does not preponderate against that finding relative to counsel's strategic choice. See DeCoster, 487 F.2d at 1201.

III.

The petitioner contends that his attorney should have defended the charges by minimizing the petitioner's involvement in them, rather than focusing on weaknesses in the state's evidence identifying the petitioner as a perpetrator. The evidence does not preponderate against the trial court's finding that counsel strategically chose the identity defense because the petitioner denied any involvement in the crimes and a minimal culpability defense would have been inconsistent with that denial. The record demonstrates that the petitioner maintained complete innocence, even after the jury's verdict finding him guilty of the offenses. The petitioner's attorney cannot be faulted for choosing a strategy that was consistent with his client's insistence he was not present at the crime scene. See id.

IV.

Finally the petitioner claims that his attorney was ineffective because he failed to raise sentencing issues on direct appeal. The trial court found that counsel's performance was deficient in this respect but that the petitioner had not demonstrated how he was prejudiced. In his brief, the petitioner makes conclusory statements that the maximum sentence imposed for aggravated rape should have been appealed because he did not physically penetrate the victim and was not in the room when Jackson did so. He argues his aggravated burglary conviction was worthy of mitigation because he only went to the victim's home attempting to recover property he believed was his. He asserts, without citing to the record, "[t]he mitigating evidence is in the trial record." The petitioner's brief does not address the issue of consecutive sentencing. The petitioner has cited no authority to this court supporting his position that he was entitled to sentencing relief, had the appropriate issues been raised in the trial court and on direct appeal. We hold that the petitioner has failed to show he was prejudiced by his attorney's failure to attack the consecutive nature of his sentences.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, JUDGE